

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 0.23 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT <http://www.ca2.uscourts.gov/>), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of January, two thousand and seven.

Present: ROSEMARY S. POOLER,
SONIA SOTOMAYOR,
RICHARD C. WESLEY,

Circuit Judges.

VOLODYMYR GEMBEL,

Petitioner,

-v.-

No. 02-4779-ag

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Appearing for petitioner: Vlad Kuzmin, Kuzmin & Associates, P.C., New York, NY

For Respondents: Susan Steele, Assistant United States Attorney, for Christopher J. Christie, United States Attorney for the District of New Jersey, Newark, NJ

UPON DUE CONSIDERATION of this petition for review of a decision of the Board of Immigration Appeals (“BIA”), it is hereby **ORDERED, ADJUDGED, AND DECREED** that the petition for review is **DENIED**.

Petitioner Volodymyr Gembel, a citizen of Ukraine, seeks review of an October 23, 2002, order of the Board of Immigration Appeals (“BIA”), dismissing Gembel’s appeal of an August 7, 2001, order of Immigration Judge (“IJ”) Alan L. Page, denying Gembel’s application for withholding of removal and relief under the Convention Against Torture (“CAT”). In re Gembel, No. A 76 019 769 (B.I.A. Oct. 23, 2002), aff’g No. A 76 019 769 (Immig. Ct. N.Y. City Aug. 7, 2001). We assume the parties’ familiarity with the underlying facts, procedural history, and specification of issues on appeal.

Where, as here, the BIA does not adopt the decision of the IJ, we review the decision of the BIA. See Ming Xia Chen v. Board of Immigration Appeals, 435 F.3d 141, 144 (2d Cir. 2006); see also Yan Chen v. Gonzales, 417 F.3d 268, 271 (2d Cir. 2005). We review the factual findings underlying the BIA’s determination that an applicant has failed to sustain his burden of proof under the substantial evidence standard. Diallo v. INS, 232 F.3d 279, 287 (2d Cir. 2000).

To qualify for withholding of removal, Gembel must establish a “clear probability” of persecution, i.e., that it is more likely than not that his life or freedom would be threatened. 8 U.S.C. § 1231(b)(3)(A); see also INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (higher standard for withholding than for asylum). A past threat to life or freedom creates a rebuttable presumption of a future threat. 8 C.F.R. § 1208.16(b)(1). Gembel contends that he suffered past persecution on account of his religion, when he was harassed and beaten by a Ukrainian nationalist group. Although “it is well established that private acts may be persecution if the government has proved unwilling to control such actions,” Ivanishvili v. U.S. Dep’t of Justice, 433 F.3d 332, 342 (2d Cir. 2006), Gembel has not shown that the government was, in fact, unwilling or unable to control the actions of his persecutors. Accordingly, he has not established past persecution and his claim for withholding of removal is denied.

Gembel’s CAT claim relies on the same underlying facts. To obtain CAT relief, Gembel must show that it is more likely than not that he would be tortured if he returned to Ukraine. 8 C.F.R. §§ 1208.16(c), 1208.17; see also Khouzam v. Ashcroft, 361 F.3d 161, 168 (2d Cir. 2004). Furthermore, Gembel must show either that he would be tortured by the government or that such torture would be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” 8 C.F.R. § 1208.18(a)(1); see also Khouzam, 361 F.3d at 171 (petitioners must show “that government officials know of or remain willfully blind to an act [of torture] and thereafter breach their legal responsibility to prevent it”). Because Gembel has not demonstrated that the government instigated or consented to the acts of the Ukrainian nationalists, his claim for CAT relief is denied.

Accordingly, the petition for review is **DENIED**. Having completed our review, the pending motion for a stay of removal in this petition is **DENIED** as moot.

FOR THE COURT:
THOMAS ASREEN, Acting Clerk

By: _____